TABLE OF CONTENTS

	Page
Question Presented	1
Statement of Facts and of the Case	2
Petitioner's Authorities Distinguished	7
Conclusion	9

TABLE OF AUTHORITIES

Cases:	Page
Blair v. U. S. Steel Corp., 312 F.Supp. 293 (W.D. Penn. 1970)	6
Brown v. L. A. Wells Construction Co., 143 Ohio 580, 56 N.E.2d 451	3
Chenevert v. Clinch Drilling Co., 273 F.Supp. 943 (1967)	4
City of Los Angeles v. United Dredging Co., 14 F.2d 364 (9th Cir. 1926)	3
Frankel v. Bethlehem-Fairchild Shipyard, Inc., 132 F. 2d 634 (4th Cir. 1942)	9
Guerrini v. U. S., 167 F.2d 352 (2nd Cir. 1948)	7, 8
Hill v. Diamond, 311 F.2d 789 (4th Cir. 1962)	3-4
Jeffrey v. Henderson Bros., 193 F.2d 589 (4th Cir. 1951)	3
Lawlor v. Socony-Vacuum Oil Co., 275 F.2d 599 (2nd Cir. 1960)	5
Moye v. Sioux City & New Orleans Barge Lines, Inc., 402 F.2d 238 (5th Cir. 1968)	5
Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959)	6
Peck v. U. S. Steel Corp., 446 F.2d 891 (8th Cir. 1971)	1
Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953)	5
Producers Drilling Co. v. Grey, 361 F.2d 432 (5th Cir. 1966)	3

Page

Reed v. The Yaka, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed. 2d 448 (1963) ____ 2, 5

Roper v. U. S., 368 U.S. 20, 82 S.Ct. 5, 7 L.Ed.2d 1 (1961) ____ 8

Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946) ____ 2, 5, 8

Shamrock Towing Co. v. Fichter Steel Corp., 155 F.2d 69 (2nd Cir. 1946) ____ 3

Showboat, The, 47 F.2d 286 (1930) ____ 3

Summerlin v. Massman Construction Co., 199 F.2d 715 (4th Cir. 1952) ____ 2

U. S. v. Moran Towing & Transp. Co., 374 F.2d 656 (4th Cir. 1967) ____ 3

Usner v. Luckenbach Overseas Corp., 91 S.Ct. 514 (1971) ____ 7

Watz, John M., v. Zapata Off-Shore Co., 431 F.2d 100 (5th Cir. 1970) ____ 5

West v. U. S., 361 U.S. 118, 80 S.Ct. 189, 4 L.Ed.2d 161 (1959) ____ 8

In The

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-556

UNITED STATES STEEL CORPORATION,

Petitioner,

vs.

FRANCIS R. PECK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Petitioner's brief misstates the nature of the legal issue, or issues, sought to be reviewed. These issues are whether the Findings of Fact made by the trial court, sitting without a jury, that the derrick barge was a vessel in navigation and the respondent's work was such as to entitle him to the protection of seaworthiness were clearly erroneous. The Court of Appeals in an opinion now reported as *Peck v. U. S. Steel Corp.*, 446 F.2d 891 (8th Cir. 1971), decided the Findings were not clearly erroneous and that the trial court correctly applied the law to the facts as found.

STATEMENT OF FACTS AND OF THE CASE

The statement of petitioner was prepared in disregard of the applicable principles of review that the evidence is to be viewed and construed favorably to the prevailing party below, and all reasonable inferences of which the evidence is fairly susceptible should be drawn in support of, and not against, the judgment rendered below.

Petitioner adopts verbatim the first eight Findings as a part of its Statement, but condenses and paraphrases the vital and important Findings numbers 9 to 18 and numbers 24 and 25. The version on pages 5, 6 and 7 of the Petition is at variance in important respects with the actual Findings. Hence, in the interest of brevity and accuracy, we adopt as our Statement of Facts the complete Findings made by the trial court and sustained by the Court of Appeals, which will be found in the Appendix to the Petition, pages 17 to 27. However, the only Findings relative to the issues raised by this appeal are numbers 1 to 25, inclusive. Findings 26, et seq., relate to matters presently of no helpful relevance.

The legal principles which govern decision here have been well established by this court and the federal courts generally for many years, especially since the days of *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946), and *Reed v. The Yaka*, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963).

Petitioner seeks to have this case reviewed because of the supposed necessity of determining the exact perimeter of the rule permitting a shore-based worker to recover under the doctrine of seaworthiness. It is not only unnecessary in the case at bar to define the precise scope of this doctrine, but it is legally impossible to arrive at a final and ultimate solution which will anticipate all future problems and factual situations. Courts always have and always will have some

problems in the application of legal principles, howsoever well settled, to varying sets of facts.

It cannot be reasonably disputed that under settled principles the respondent is entitled to recover damages if

(1) The derrick barge was a vessel under admiralty law, and

(2) The vessel was in navigation within the meaning of admiralty law, and

(3) The respondent was doing work usually done by seamen or essential to the mission of the vessel.

That the S-2 derrick barge was a vessel was established overwhelmingly. As said in *U. S. v. Moran Towing and Transp. Co.*, 374 F.2d 656 (4th Cir. 1967):

> "We have held several strange crafts to be vessels. A floating derrick engaged in pouring concrete for a bridge is one. So is a barge moored behind piles on a river bank and serving as a platform for coal cleaning machinery. We have held that a floating pile driver is a vessel. There are similar holdings elsewhere. Even an off shore drilling platform resting on legs extending to the bottom of the sea has been held to be a vessel."

The following authorities will be sufficient to establish that this statement is in accordance with the overwhelming weight of judicial authority: *Summerlin v. Massman Construction Co.*, 199 F.2d 715 (4th Cir. 1952), involving a floating derrick; *Producers Drilling Co. v. Grey*, 361 F.2d 432 (5th Cir. 1966), involving a drilling rig; *City of Los Angeles v. United Dredging Co.*, 14 F.2d 364 (9th Cir. 1926), involving a dredge; *Brown v. L. A. Wells Construct. Co.*, 143 Ohio 580, 56 N.E.2d 451, involving a scow; *Shamrock Towing Co. v. Fichter Steel Corp.*, 155 F.2d 69 (2nd Cir. 1946); *The Showboat*, 47 F.2d 286 (1930); *Jeffrey v. Henderson Bros.*, 193 F.2d 589 (4th Cir. 1951); *Hill v. Diamond*,

311 F.2d 789 (4th Cir. 1962); and *Chenevert v. Clinch Drilling Co.*, 273 F. Supp. 943 (1967).

It was stipulated that the vessel, at all determinative times, was upon navigable waters of the United States (App. 90). The trial court found as a fact and concluded as a matter of law that the vessel was in navigation at the time of the accident (App. 17-20; 25). In determining whether a vessel is "in navigation" the courts have consistently emphasized not one but a variety of factors:

(1) Who had control of the craft?

(2) Were other crew members on board?

(3) What were the special purposes of the craft?

(4) Was the employee on board in aid of one of such purposes?

(5) Was the vessel in use for one of its designed purposes?

(6) Was it subject to any of the perils of navigation at the time?

We submit that as a matter of law these questions should be answered in favor of respondent. The derrick was operating and functioning and being used to lift an object far heavier and far more closely related to navigation than a steel beam or girder, namely, a tug boat. The respondent was cleaning up the deck and had finished coiling the anchor cables (App. 40; 65). The craft was subject to the buffeting of high winds and high waves, even to such an extent that the foreman would have to arouse himself in the nighttime to determine whether the mooring cables were too slack or too taut (App. 69, 81). At the time of the derrick collapse the barge was under the exclusive control of petitioner, its owner, and not under the control of any independent shipyard or repair facilities. Petitioner was solely responsible

for the defective condition of unseaworthiness which caused the collapse. It appears without dispute that at the time of the accident the derrick barge was being used for one of its designed purposes, namely, lifting.

Many of the above factors were discussed and many were held to be determinative in *Lawlor v. Socony-Vacuum Oil Co.*, 275 F.2d 599 (2nd Cir. 1960); *Moye v. Sioux City & New Orleans Barge Lines, Inc.*, 402 F.2d 238 (5th Cir. 1968); and *John M. Watz v. Zapata Off-Shore Co.*, 431 F.2d 100 (5th Cir. 1970).

The doctrine of unseaworthiness has been extended to longshoremen and other shore-based workers since *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946), where a longshoreman was engaged in loading and unloading a vessel, the theory being that he was "doing a seaman's work and incurring a seaman's hazards".

There is nothing talismanic about the phrase "loading" or "unloading"; the unseaworthy doctrine has been applied to shorebased workers not engaged in loading or unloading, such as the carpenter employed by a refitting company doing repair work in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953). The fact that Hawn was repairing something connected with the loading apparatus was a mere coincidence. He was a carpenter performing a ship's service. Since respondent was doing the work of a deckhand and work traditionally done by seamen, he is in the same position as a crew member. The justification commonly used for the warranty of seaworthiness is best summarized in the case of *Reed v. The Yaka*, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed. 448 (1963), where the court, referring to *Sieracki*, said:

> "The hazards of marine service, the helplessness of men to ward off the perils of unseaworthiness, the harsh-

> ness of forcing them to shoulder their losses alone, and the broad range of the 'humanitarian policies' of the doctrine of seaworthiness, we held not to depend upon any kind of contract. 328 U.S. at 93-95, 66 S.Ct. at 876-877. We further held that the Longshoremen's and Harbor Workers Act was not intended to take away from longshoremen the traditional remedies of the sea, so that recovery for unseaworthiness could be had notwithstanding the availability of compensation."

By analogy, *Offshore Company v. Robison*, 266 F.2d 769 (5 Cir. 1959), is interesting and helpful. The question was: When is a roughneck a seaman? In a scholarly opinion the court concluded that such terms as "vessel", "seaman" and "member of a crew", have such a wide range of meaning that, except in rare cases, only a jury or trier of facts can determine their application in the circumstances of a particular case. "Even where the facts are largely undisputed, the question at issue is not solely a question of law when, because of conflicting inferences that may lead to different conclusions among reasonable men, a trial judge can not state an unvarying rule of law that fits the facts."

The court held that a seaman on a drilling rig, anchored in coastal waters, may be exposed to more hazards than blue water sailors, such as the collapse of top-heavy drilling barges. The remark is as applicable to respondent as it was to Robison:

> "There is no reason for lamentations. Expansion of the terms 'seaman' and 'vessel' are consistent with the liberal construction of the Act that has characterized it from the beginning and is consistent with its purposes. Within broad limits of what is reasonable, Congress has seen fit to allow juries to decide who are seamen under the Jones Act."

Directly in point that Peck falls within the protected class is *Blair v. U. S. Steel Corp.*, 312 F. Supp. 293 (W.D. Pa. 1970), wherein Judge Gourley said:

> "In determining whether to extend the doctrine (seaworthiness) to the facts of this case. the court has considered what must be brought to the forefront at all times—the humanitarian policy of the doctrine of unseaworthiness. Consideration must be given to the hazards of marine service, the helplessness of the men to learn or know of, and ward off, the perils of unseaworthiness * * * the duty to provide a seaworthy vessel is rooted, not in contracts, but in the hazards of the work of the person required to go upon the vessel to perform duties and pursue his employment at all times of the day and night and varying conditions and circumstances."

PETITIONER'S AUTHORITIES DISTINGUISHED

Petitioner relies principally upon *Usner v. Luckerbach Overseas Corp.*, 91 S.Ct. 514 (1971), and *Guerrini v. U. S.*, 167 F.2d 352 (2nd Cir. 1948). When the quotations from *Usner* and *Guerrini* relied upon by petitioner are read in context, it will be found that neither case has any helpful relevance.

In *Usner* a longshoreman was injured when the winch operator lowered the boom and the fall, too far and too fast, knocking him to the deck. There was nothing wrong with any of the equipment. The plaintiff there claimed unseaworthiness, but could establish nothing except negligence on the part of the winch operator, his fellow employee. Both were employed by the stevedoring company, who was directing the work as an independent contractor. The cause of the plaintiff's injuries was "not the condition of the ship, her appurtenances, her cargo or her crew but the isolated personal negligent act of the petitioner's fellow longshoreman." Where there was no condition of unseaworthiness, the court refused to hold the ship owner liable for a third party's single act of negligence. In the case at bar the immediate cause of the accident was the condition of the rear

leg of the tower as explained by the trial court in Findings 24 and 25 (App. Pet. Br. 23).

Again, the *Guerrini* case was solely a negligence case. The ship was alongside the dock of the Continental shipyards, a contractor, apparently for general overhauling, and the Bell Contracting Company was employed as a subcontractor. Plaintiff was an employee of the subcontractor. He slipped and fell. The court refused to extend *Sieracki* and liability for unseaworthiness to the employee of a subcontractor or "to all workmen upon a ship, however casual their presence there", stating that such an innovation should await the sanction of the Supreme Court. A very different picture is presented in the case at bar where respondent was performing the work of a deck hand, and we respectfully suggest that no extension of the *Sieracki* doctrine is necessary to sustain the decision of the courts below. In *Guerrini* the case was sent back to the trial court for more specific findings on the issue of negligence because the Findings of the trial court were not sufficient to permit final disposition of the case. There is no such question raised in the case at bar.

West v. U. S., 361 U.S. 118, 80 S.Ct. 189, 4 L.Ed.2d 161 (1959), distinguishes itself:

> "Petitioner overlooks that here the respondent had no control over the vessels, or power either to supervise or to control the repair work in which petitioner was engaged. We believe this to be decisive against both aspects of plaintiff's dual theory."

In *Roper v. U. S.*, 368 U.S. 20, 82 S.Ct. 5, 7 L.Ed.2d 1 (1961), the ship was deactivated, mothballed and disemboweled; it joined the dead fleet and was used as a granary for the storage of grain. Two years later, while it was in the sole and exclusive custody and control of the Continental Grain Company, the plaintiff, a longshoreman employed by a stevedoring company, sustained his injuries. It was held

that the trial court's findings that she was a dead ship and not in navigation were not clearly erroneous.

Frankel v. Bethlehem-Fairchild Shipyard, Inc., 132 F.2d 634 (4th Cir. 1942), involved solely the question of whether plaintiff was a seaman under the Jones Act. He was a handyman employed by a shipbuilding company. He was injured while installing machinery. In his suit solely under the Jones Act, the trial court held he was not a seaman and the Court of Appeals affirmed primarily because the contract to build the ship was nonmaritime and plaintiff was not a member of a crew and had no duties relating to navigation.

CONCLUSION

It is respectfully submitted that petitioner has wholly failed to sustain its burden of establishing under Rule 19 that there are special and important reasons why the writ should be granted. The decision below did not involve an important question of federal law which has not been, but should be, settled by this court; nor has the Court of Appeals decided a federal question in a way to conflict with applicable decisions of this court or of another Court of Appeals on the same matter. The Court of Appeals correctly held the Findings of Fact and Conclusions of Law of the trial court were not clearly erroneous.

Respectfully submitted,

WILLIAM H. DEPARCQ
JAMES R. SCHWEBEL
DEPARCQ, ANDERSON, PERL & HUNEGS
565 Pillsbury Building
Minneapolis, Minnesota 55402
Tel.: (612) 339-4511
Attorneys for Respondent

CERTIORARI DENIED N.C.R.